**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

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| **MICHELLE CHINNICK,**<br><br>Plaintiff,<br><br>vs.<br><br>**NATIONAL CREDIT SYSTEMS, INC.,**<br><br>Defendant. | Case No.: 2:15-cv-1675-BJR<br><br>**PLAINTIFF'S RESPONSE TO DEFENDANT NATIONAL CREDIT SYSTEMS, INC.'S MOTION FOR SUMMARY JDUGMENT** |

## I. INTRODUCTOIN

Defendant's Motion should be denied because the 15 USC 1692e(5) claim is not prohibited by the limitation of actions because of the "discovery rule," and there are genuine issues of fact with regard to the violations pertaining to recent credit reporting of the debt.

## II. RESPONSE TO DEFENDANT'S STATEMENT OF FACTS (Document 25, pp. 2-3)

Defendant's SOF (1) – Admit.

Defendant's SOF (2) – Admit.

Defendant's SOF (3) – Denied. Plaintiff obtained evidence of credit reports by Experian and Equifax that did not list the debt as disputed. Declaration of Michelle Chinnick, § 2, filed herewith, Exhibit "A."

Defendant's SOF (4) – Denied. See reason in response to Defendant's SOF (3)

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Defendant's SOF (5) – Denied. See reason in response to Defendant's SOF (3)

## III. ADDITIONAL RELEVANT FACTS

(1) The debt in question allegedly arose from charges by an apartment complex at which Plaintiff admits to have lived and to reside at which Plaintiff signed a rental agreement. (Declaration of Michelle Chinnick, § 3, filed herewith).

(2) The debt in question was for unpaid rent. However, Plaintiff left the apartment only because the apartment she was residing in was infested with dangerous mold due to standing water that was left for several days all over the apartment after a washing machine exploded, and was no longer habitable. (Declaration of Michelle Chinnick, § 4, filed herewith).

(3) Plaintiff gave adequate notice to The Timbers at Kenmore of the uninhabitability of the apartment a long time before moving out, and The Timbers did nothing to resolve it and ceased returning her calls, prompting the need for Plaintiff to break the lease and find a new place to live. (Declaration of Michelle Chinnick, § 5, filed herewith).

(4) There is no evidence that The Timbers at Kenmore attempted to mitigate their damages or were unable to re-rent the apartment in question.

(5) Defendant threatened to sue Plaintiff in a conversation that took place on October 15, 2013. Plaintiff had every reason until shortly before filing this lawsuit in October, 2015, to believe that Defendant did intend to file suit against her eventually. During the call, Plaintiff alerted Defendant to the each of the facts stated in paragraphs (1-4 & 6) herein. Defendant acknowledged the dispute in their account notes but failed to do anything (Declaration of Michelle Chinnick, § 6, filed herewith; Declaration of Joshua Trigsted, § 2, Exhibit "A", Defendant's account notes, p. 1).

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(6) Plaintiff eventually spoke with the office manager in person shortly before moving out of the apartment, and the apartment manager agreed to allow her to break the lease because of the state of her apartment, and Plaintiff left the apartment in reliance on this promise. (Declaration of Michelle Chinnick, § 7, filed herewith).

(7) Defendant never actually filed suit against Plaintiff for the debt.

## IV. THE 15 USC 1692E(5) CLAIM IS NOT BARRED BY THE 1 YEAR LIMITATIONS PERIOD

The state of the law on the "discovery rule" is not in dispute. Defendant accurately cited the cases that describe the nature of the rule. (Document 25, pp. 4-5). The key fact for determination of when the limitation period starts to run is "when would a reasonably diligent Plaintiff have discovered the facts constituting the violation." *Id., citing Strategic Diversity, Inc. v. Alchemix Corp.,* 666 F.3d 1197, 1206 (9th Cir. 2012).

Ordinarily, the "facts constituting a violation" are facts about events that occur at a specific point in time. Here, Defendant argues as if it assumes that this point in time is the date of the threat. Defendant treats the date as the date in the Complaint, but since reviewing Defendant's documents, which do not reflect a telephone conversation in 2011, Plaintiff now believes that the conversation in question took place in 2013. Regardless of when the conversation took place, however, the nature of the violation consists in making a threat that Defendant did not intend to follow through on, and the facts that lead to the violation are not tied to the date of the threat. In fact, the relevant time period persisted at least through the time of filing of this lawsuit, and arguably through 2016, when the limitations period should have expired on this debt that arose in 2010. It was only on the expiration of the limitations period that Plaintiff or anyone else for that matter could have reasonably discovered whether Defendant actually intended to sue as threatened.

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If Defendant had threatened to sue immediately or by a specific time, Plaintiff would have known at the expiration of that time that the threat was false. However, given that Defendant did not threaten imminent suit, only eventual suit, no reasonable inquiry could have discovered the falsity of Defendant's threat. Indeed, it is absurd to expect Plaintiff to have filed suit against Defendant for falsely threatening to file suit before the limitations period expired. Had such a lawsuit been filed in 2013, the result would have been predictable. Whether Defendant actually intended to file suit or not before Plaintiff's theoretical 2013 lawsuit, it would have filed a lawsuit against Plaintiff for the debt in order to negate Plaintiff's claim. Of course, the fact that Plaintiff had the ability to file the lawsuit in 2013, 2014, 2015, and 2016 is exactly the point. Plaintiff simply could not have known that Defendant did not intend to follow through on its threat until it was impossible for Defendant to follow through on its threat.

## V. THERE IS A GENUINE DISPUTE ABOUT WHETHER DEFNDANT FALSELY ACCUSED PLAINTIFF OF OWING A DEBT OR FAILED TO REPORT IT AS DISPUTED

The FDCPA prohibits a debt collector from making a false representation about the amount or character or legal status of any debt. 15 USC 1692e(2)(A). Here, Plaintiff alleges that Defendant reported her debt as owing to credit bureaus within 1 year of the filing of the Complaint even after it knew or should have known that the debt was not valid. (Document 15, § 11). Quite simply, debt collectors are strictly liable under the FDCPA for stating that somebody owes a debt when they actually do not owe said debt. *Wheeler v. Premiere Credit North America, LLC*, 1580 F.Supp.3d 1108, 1112-16 (SD CA 2015)(Summary judgment denied on e(2)(A) claim where there was a genuine dispute over whether Plaintiff owed debt); *Owens v. Howe*, 2004 WL 6070565, p. 11 (ND Ind. 2004) (summary judgment granted to Plaintiff because Defendant admitted to suing the wrong person for the debt). If Plaintiff does not owe the debt, Defendant's only defense is the

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defense of *bona fide* error under the FDCPA. 15 USC 1692k(c). Under the federal Fair Debt Collection Practices Act (FDCPA), if a debt collector reasonably relies on the debt reported by the creditor, the debt collector will not be liable for any errors; however, the bona fide error defense will not shield a debt collector whose reliance on the creditor's representation is unreasonable or who represents a debt amount to the consumer that is different from the creditor's report. *Clark v. Capital Credit & Collection*, 460 F.3d 1162, 1176-77 (D.Or. 2006).

Plaintiff does not owe the debt here, for two reasons. First, Plaintiff does not owe the debt because the only reason she left her apartment 3 months early was because the apartment was uninhabitable. A tenant under Washington law has the right to rescind the lease if the landlord breaches the implied warranty of habitability. *Landis & Landis Const., LLC v. Nation*, 286 P.3d 979, 982-83 (WA Ct. App. 2012).

It is undisputed that Defendant reported to credit bureaus within 1 year of the filing of the Complaint that Plaintiff owed a debt of $3,622.50 to the Timbers at Kenmore. It is also undisputed that Plaintiff gave Defendant reason to know that Plaintiff did not actually owe the debt. Because Defendant received detailed information from Plaintiff about precisely why Plaintiff did not owe the debt, Defendant could not reasonably rely on its client any further without itself investigating or demanding further proof from its client on the reasons for which Plaintiff disputed the debt. It could no longer "blindly rely" on the representations of its client. But that is what Defendant did. They continued to report the full amount originally demanded from Plaintiff, an amount that Plaintiff did not owe. Defendant does not address this issue whatsoever in its Motion, apparently on the assumption that the only issue was whether they reported the debt as "disputed" to credit bureaus. Plaintiff should be afforded further time to respond to Defendant's allegations if evidence on this point is raised for the first time in Defendant's reply.

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With respect to Defendant reporting the debt as "disputed" to the credit bureaus, Plaintiff has presented evidence of at least one report obtained by her that does not show the debt listed as "disputed" under the comments section where such item is normally listed. Defendant has presented no evidence other than self-serving testimony that it did actually make that report. Thus, there is a genuine dispute of fact.

## VI. CONCLUSION

Defendant's Motion should be denied. There are genuine issues of fact with regard to each allegation in Plaintiff's First Amended Complaint that can only be resolved by a trial.

Dated this 6th day of January, 2017.

By: s/Joshua Trigsted
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